

**U.S. Department of Labor**

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**Issue Date: 30 November 2004**

**CASE NO.: 2004-LHC-906**

**OWCP NO.: 07-165220**

**IN THE MATTER OF**

**KENYA BROOKS,  
Claimant**

**v.**

**UNITED SCAFFOLDING, INC.,  
Employer**

**and**

**ZURICH AMERICAN INSURANCE CO.,  
Carrier**

**APPEARANCES:**

**Joseph G. Albe, Esq.  
On Behalf of Claimant**

**Jeffrey I. Mandel, Esq.  
On Behalf of Employer/Carrier**

**BEFORE: C. RICHARD AVERY  
Administrative Law Judge**

**DECISION AND ORDER**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Kenya Brooks

(Claimant) against United Scaffolding, Incorporated (Employer), and Zurich American Insurance Company (Carrier). The formal hearing was conducted in Metairie, Louisiana on September 23, 2004. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.<sup>1</sup> The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-11 and Employer's Exhibits 1-17. This decision is based on the entire record.<sup>2</sup>

### **Stipulations**

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on September 20, 2002;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on September 20, 2002;
5. Notices of Controversion were filed February 19, 2003 and May 2, 2003;
6. An informal conference was held on November 20, 2003; and
7. Date of maximum medical improvement was March 30, 2004.

### **Issues**

The unresolved issues in this proceeding are:

1. Nature and Extent of Disability;
2. Average Weekly Wage;
3. Section 7 Medicals;
4. Entitlement to credit for benefits paid to or on behalf of Claimant;
5. Entitlement to credit for actual wages earned by Claimant; and
7. Attorney fees, penalties, interest and expenses.

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<sup>1</sup> The parties were granted time post hearing to file briefs. This time was extended up to and through November 20, 2004

<sup>2</sup> The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. \_\_\_\_"; Joint Exhibit- "JX \_\_, pg. \_\_\_\_"; Employer's Exhibit- "EX \_\_, pg. \_\_\_\_"; and Claimant's Exhibit- "CX \_\_, pg. \_\_\_\_".

**Statement of the Evidence**  
**Testimonial Evidence**

**Kenya Brooks**

Claimant testified that he is 26 years old, lives in Amite, Louisiana, and has two children. He graduated from high school and completed one year of college at Southeastern Louisiana University. Claimant worked for Employer as a scaffolding builder. Claimant said that when he was hired by Employer he was told that he would earn between \$11.00 and \$12.00 per hour, but was paid \$10.75 per hour. The job with Employer required Claimant to work 12 hours per day, seven days per week, and overtime would be paid past 40 hours. Claimant received per diem and mileage reimbursement in cash on a daily basis. Claimant said the job site was in Sulphur, Louisiana, approximately four hours from his residence in Amite. Claimant testified that he did not have transportation to get to the job site, so he rode with co-workers and paid them for gas out of the per diem funds he received.

Claimant said he had worked for Employer for “between two to four days” before the accident, which he described as occurring while he was working on a barge. Claimant recalled that he was returning to his work area after the lunch break and noted that materials were “scattered everywhere,” so Claimant watched his step to avoid the materials. As he did so, he took his eyes off his path and fell off the catwalk and into the hold. Claimant testified that he fell between five and ten feet and that he caught himself on the way down so his arms prevented him from going all the way in the hold. He remembered some men picking him up, and that his arms were scraped.

Claimant was taken by Employer’s superintendent to West Calcasieu Cameron Hospital, where Claimant said he was treated, given a drug test and a physical, and x-rays were performed. Claimant recalled he was at the hospital for about 45 minutes, then was discharged with crutches and sent home. Claimant stated that the accident affected his back, neck, and left knee. Claimant next saw Dr. Steiner in October 2002, who performed an MRI of Claimant’s lower back and knee. Claimant later saw Dr. Johnston in Baton Rouge, whose treatment included referring Claimant for physical therapy and prescribing Vioxx and Ultracet.

Claimant stated that he spoke with Employer while he was undergoing physical therapy, and Employer offered Claimant a job at its office in LaPlace,

Louisiana. Claimant recalled that the position would have paid Claimant the same hourly wage he earned before the accident and Claimant would have worked five days per week. Claimant stated that Employer also offered to drive him to any medical appointments he had on scheduled workdays. Claimant stated that though he was still in pain, he told Employer he would take the job, but he did not have transportation from Amite to LaPlace, and Employer offered none. Claimant said that Employer only paid him compensation for the last week of September, 2002 and the first week of October. Claimant testified that Employer made him no other job offer after the offer for the position in LaPlace.

Claimant returned to work with Employer at another location in February 2003, but at this time he was hired through a union, not by Employer directly. The job site was a chemical plant in Pascagoula, Mississippi, which Claimant traveled to by way of riding with co-workers. The job in Pascagoula paid a higher hourly rate because of Claimant being hired through the union, but paid per diem and mileage at the same rate as Claimant's initial job. Claimant described the Pascagoula job as having the same duties as his previous job with Employer, for they were both scaffolding jobs.

Claimant said he was not physically able to perform the job because of the trouble he suffered with his back when performing duties such as climbing, bending, and hammering. The job required Claimant to climb up and down ladders, because the scaffolding was 150 feet high. Claimant stood on a platform while he worked, and carried over seven tools on a tool belt up and down the ladders. Claimant stated that he worked 12 hours per day, seven days per week, for two weeks, after which time he was fired. Claimant testified that the supervisor told him that he was fired because he was unable to perform the responsibilities the job required. Claimant said he was told to leave and not come back.

Claimant reported that his physical complaints continued after he was fired from the Pascagoula job and until he returned to see Dr. Johnston, whom Claimant had not seen since November 21, 2002, on December 15, 2003. Claimant said he never received epidural steroid injections ("ESIs") that Dr. Johnston recommended. Claimant stated that he did not return to Dr. Johnston because he perceived Dr. Johnson as feeling that Claimant did not have any problems, which made Claimant more upset about his condition.

Claimant stated he has held other jobs since he was fired from the Pascagoula job. He performed the same type of construction work for Empire Scaffolding at a chemical plant. Claimant was placed at a warehouse job through a

temporary agency where he made \$8.15 per hour during the day and \$8.35 per hour at night, working 12 hours per day, five days per week, for a total of three weeks' duration. Claimant said he suffered problems with his back at the warehouse job when he had to kneel, climb and bend. He reported having to climb up the shelves on a ladder, and had to perform overhead lifting, pushing, pulling, and carry more than 20 pounds. Claimant said he has been looking for work and recently applied at a plywood plant. Claimant stated that driving for over an hour causes him back problems. He did not agree with Dr. Johnston that he could work without limitation, and believed he was still limited in the areas of kneeling, squatting, and climbing.

On cross-examination, Claimant admitted that he incorrectly testified that his mother drove him to the hearing, and acknowledged that his mother drove him to his aunt's house and he drove to the hearing. He agreed that in his deposition, he said the reason he did not take the job Employer offered him in LaPlace was because he had transportation problems. Claimant said he failed to attend an appointment Employer scheduled for him with Dr. Steiner on February 16, 2004 because he was not aware of the appointment, nor was he aware that Carrier scheduled appointments for him to see Dr. Johnston on June 8, 2004 and July 26, 2004.

Claimant admitted that in his deposition he stated he had seen Dr. Johnston several times in 2003 when in fact he saw Dr. Johnston only once that year. He also admitted that in his deposition he stated he had not seen Dr. Johnston in 2004 when he saw him on March 30, 2004. Claimant acknowledged that Employer had sent Claimant mileage funds for him to attend a functional capacity evaluation which was cancelled, accordingly, Carrier requested Claimant return the check. Claimant stated that he cashed the check on September 1, 2004, and learned of the cancellation on September 2, but admitted that the signature on the check with the date of deposit as September 2 was his.

Claimant admitted that he wanted the job in Pascagoula and the only way he could have obtained it was through the union, and as a result was paid a higher wage. He stated that at the Pascagoula job, he performed the same work but received higher pay. Claimant acknowledged that when he was hired at the Pascagoula site, he completed a "Second Injury Fund Questionnaire" which in his deposition he stated he filled out truthfully; however, at the hearing, Claimant admitted that he lied in his responses on the form. Specifically, Claimant indicated on the form that he did not have any disability or physical or mental condition which limited or restricted him. He also admitted that he was not truthful when he

responded that he had no pain or trouble in his knees, back, shoulders or neck, and when he indicated that he had not suffered any previous injuries. Claimant admitted that he was lying when on the form he stated that his activities were not restricted, and that he was not truthful on the "Job Application Consent and Waiver Form" when he indicated he did not have any problems. Claimant explained that he provided this false information to get work, and to be able to provide for his family.

Also, Claimant admitted that though he testified that he was fired from the Pascagoula job because he could not physically perform it, the actual reason he was fired was because he failed a breath alcohol test. Claimant agreed that he had previously stated that he could not sit longer than 30 minutes without having to get up, but had been seated for an hour and 45 minutes while testifying at the hearing.

On redirect, Claimant stated that he could physically perform the Pascagoula job, but he had difficulty doing so, and experienced pain while performing the job. He explained the results of the breath alcohol test by stating that he did not drink while he was on duty, and his understanding of Employer's alcohol and drug use policy was that when he was off work he could do what he wanted.

#### Troy J. Gulotta

Mr. Troy J. Gulotta testified that he is a branch manager for Employer, and had held that position at the time of Claimant's accident. He stated that Employer considers sedentary duty anything that can be done in a sitting position, and that such work was available for Claimant on October 16, 2002 when Claimant was released to return to work. Mr. Gulotta said that Employer does not create jobs for injured employees, but if an injured employee is capable of performing a job Employer has available, he is placed in that position.

Mr. Gulotta testified that Claimant was made aware that Employer had work available for him at the LaPlace location in October, 2002. The sedentary job was described by Mr. Gulotta as allowing Claimant to sit or stand as he needed, and would have involved him sorting scaffold clamps weighing two to three pounds and putting them in a box. There was no kneeling, squatting, bending or overhead work involved in the position. Claimant was also told that Employer would provide transportation to Claimant's medical appointments. Mr. Gulotta said that on November 22, 2002, Claimant was released to modified duty, and Employer had positions that met those requirements as well. He stated that these positions

were made known to Claimant. Mr. Gulotta stated that Claimant did not accept the position that was offered.

On cross-examination, Mr. Gulotta acknowledged that he did not know for a fact that anyone from Employer's office contacted Dr. Steiner to inquire what he meant by "sedentary" work, and as a result he did not know whether Employer's definition of sedentary conformed to what was intended by the physician. Mr. Gulotta stated that in the modified position, Claimant would have been paid \$10.75 per hour, at least 40 hours per week, though he agreed that since Claimant would be working with supplies, the hours could vary depending on the amount of work occurring in the field. He said that whether overtime hours were available would have depended on how much support was needed, and that per diem was not available because the job was not more than 100 miles from the office. He stated that when Claimant was offered the position, he never said that he would have difficulty getting to LaPlace due to transportation problems.

#### Jack Rhodus

Mr. Rhodus testified that he is the corporate safety and health manager for X-Serve, which is the parent company of Employer and several other companies. He said he was frequently at the Pascagoula site as part of his duties and had occasion to speak with people who supervised Claimant's work at that site. He stated that Claimant built scaffolding at the Pascagoula site, but because of the employment practices used, the main office in LaPlace would not necessarily have known if Claimant was working in Pascagoula.

Mr. Rhodus stated that Employer has a substance abuse policy which includes alcohol. He said that one of the Pascagoula safety employees smelled alcohol on Claimant's breath and reported the matter to an associate who performed a positive saliva test and then a breathalyzer test as means of confirmation. Mr. Rhodus said that the positive tests were the reason for Claimant's termination.

On cross-examination, Mr. Rhodus stated that the scaffolding work performed by Claimant involved light, medium and heavy activity levels, depending on the circumstances. He said there is a good possibility that Claimant would have had to lift or carry 20 pounds of material. On redirect, Mr. Rhodus testified that Claimant did not request any accommodations at the Pascagoula site, and no job modifications were made for him.

Kathy L. Hadlow

Ms. Hadlow testified that she is employed by Carrier and was the claims representative assigned to handle Claimant's claim. She was advised of the claim on October 14, 2002, after which time past due benefits were paid to Claimant. Ms. Hadlow stated that the compensation rate was \$241.52, the minimum compensation rate at the time. This rate was used because Claimant had not been with Employer for a period of greater than a couple of weeks. She said she requested wage information from Claimant and his original and current counsel, but had not received such information as of the date of the hearing. Ms. Hadlow explained that compensation benefits were initiated on September 30, 2002, the date that Dr. Steiner removed Claimant from all work, and benefits were terminated on October 11, 2002, the date Dr. Steiner indicated that Claimant was capable of performing sedentary duty which Employer had available.

Ms. Hadlow stated that she has not received any medical report stating that Claimant is disabled since November 2002. She said Claimant did not receive any medical treatment between November 2002 and December 2003. Ms. Hadlow said that she received Dr. Johnston's request for Claimant to receive ESIs, and in response, she wanted Claimant to see Dr. Steiner, Employer's choice of physician. She explained that she did not technically deny the ESIs, but wanted to determine whether they were medically necessary in the opinion of another physician.

On cross-examination, Ms. Hadlow stated that she contacted Dr. Steiner's office in order to determine if the sedentary position offered by Employer conformed with his requirements. She said that a sedentary position was a sit-down desk job with basically no lifting involved. She said the reason Claimant did not attend two appointments she scheduled for him with Dr. Steiner was because Claimant wanted prepaid mileage to attend the appointments.

### **Medical Evidence**

#### **West Calcasieu Cameron Hospital**

Claimant was seen at the emergency room at West Calcasieu Cameron Hospital on September 20, 2002, the day of the accident. The records state that Claimant complained of middle and lower back pain and suffered a contusion to his left knee. Claimant was discharged with crutches in stable condition, and was told to take Motrin, rest and to ice and elevate his leg (CX 5, EX 17).

### Elmwood Industrial Medical Center

On September 24, 2002, Claimant was seen by Dr. David Reiss at the Elmwood Industrial Medical Center where he complained of pain in his left leg and lower back. Claimant returned on September 27, 2002 where the notes indicate he was walking with crutches and complained of being "in bad shape." Claimant had undergone an MRI which showed no ruptured disc, herniation, or nerve compression. Claimant was diagnosed with muscle strain and a contusion and referred to Dr. Steiner. At this visit, Dr. Reiss indicated that Claimant could perform light work until his next clinic visit (CX 7, EX 16).

### Dr. Robert A. Steiner

Dr. Steiner evaluated Claimant on September 30, 2002. At this visit he scheduled an MRI of the left knee and removed Claimant from work until the results of the test had returned. Dr. Steiner next saw Claimant on October 11, 2002. The notes from this visit indicate that Claimant complained of soreness in his back but no sciatic symptoms. Claimant also complained of left knee pain and was using a crutch. Dr. Steiner stated that the MRI revealed a bone bruise on the proximal tibia, and also opined that Claimant sustained a lumbar strain as the result of his fall. Dr. Steiner stated Claimant was not yet released to regular duty but was capable of performing some sedentary duties. He stated that Claimant was to remain off work if there was no sedentary duty available. Dr. Steiner referred Claimant to Dr. McAfee in Amite because Claimant wanted to receive treatment closer to his home (CX 6, EX 15).

### Dr. F. Allen Johnston

Claimant's initial visit with Dr. Johnston occurred on October 22, 2002, where Claimant complained of pain in his neck radiating into his right arm to his fingers, headaches, and low back pain radiating into his knee. After performing a physical examination, Dr. Johnston opined that Claimant suffered from cervical, lumbar, and knee strains. He recommended a prescription for Mobic and physical therapy, and indicated he would consider an MRI of the neck if Claimant had no improvement.

Claimant returned to Dr. Johnston on November 21, 2002 and stated that overall, his symptoms had improved since the last visit, though he did rate his back and neck pain as ten on a scale of one to ten and seven on a scale of one to ten regarding his knee. Claimant said he was attending physical therapy three times

per week which was helpful. Dr. Johnston noted no changes on physical exam. He prescribed Vioxx and Ultracet. Dr. Johnston stated Claimant could return to moderate duty with restrictions, including no lifting over 20 pounds, alternating sitting and standing, no climbing unprotected heights, and no squatting, kneeling, or overhead lifting.

Dr. Johnston did not see Claimant again until December 15, 2003, nearly a year later. At this visit, Claimant's knee symptoms had resolved, but he still complained of 10/10 pain in both his back and neck. At this time, Claimant was not taking any medication and was not involved in physical therapy. Dr. Johnston noted that Claimant had chronic cervical pain and chronic low back pain with mild spondylosis. He recommended lumbar epidural steroid injections, home exercises for Claimant's neck and back, Vioxx and Ultracet.

On March 30, 2004, Claimant returned to Dr. Johnston's office with continued complaints of severe neck and low back pain, with associated numbness and tingling in both arms and sharp shooting pain in his low back. Dr. Johnston noted that the epidural steroid injections he ordered had not yet been approved. Dr. Johnston determined Claimant had reached maximum medical improvement as of that date, but for sake of completeness, he ordered an MRI of Claimant's neck. He wanted to see Claimant again after the MRI had been performed and at that point would consider a functional capacity evaluation if the MRI was normal.

#### Professional Physical Therapy

The records from Professional Physical Therapy indicate that Claimant underwent physical therapy three times per week from November 5, 2002 until January 9, 2003. Claimant attended 15 of 19 scheduled appointments and was discharged on January 9, 2003 where it was noted that he participated well in treatment and increased his range of motion. (CX 4).

#### **Other Evidence**

Employer's Exhibit 1 is a copy of the Employer's Report of Occupational Injury or Disease which Employer furnished to the Office of Worker's Compensation on October 7, 2002. Employer's Exhibit 2 is the Employer's First Report of Injury or Occupational Illness which Employer sent to the United States Department of Labor on October 16, 2002. Employer's Exhibit 3 is the Payment of Compensation without Award form, completed on November 18, 2002, where Employer indicated Claimant's disability began on September 30, 2002 and he was

paid at a compensation rate of \$241.52. The Notice of Final Payment form is located at Employer's Exhibit 4 and indicates that Claimant was paid 1 5/7 weeks of compensation, which was terminated because Claimant was released to return to modified duty which Employer had available.

Claimant's payroll records are located at Employer's Exhibit 7. The records state that Claimant was paid \$10.75 per hour, worked a total of 82 hours and 14.5 hours in overtime. On September 20, 2002, Claimant was paid \$354.23; on September 27, he was paid \$557.79. Claimant's earnings regarding the Pascagoula job are located at Employer's Exhibit 9, which indicates that Claimant was paid \$16.56 per hour. He worked 60 regular hours and 26.5 overtime hours, resulting in net pay of \$1776.24.

Records relating to Employer's offer of modified employment to Claimant indicate that Employer was willing to provide restricted work for Claimant at its LaPlace location. A letter dated November 15, 2002 by Mr. Gulotta stated that Employer would provide "restricted work" whenever Claimant was available and would provide transportation to and from Claimant's orthopedic appointments on workdays (EX 9, p.1). A letter dated November 14, 2002, from Leslie Carter, Employer's worker's compensation claims manager, states that Claimant had refused any restricted work since September 20, but was informed again on November 13 that restricted work was available.

### **Findings of Fact and Conclusions of Law**

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

## **Causation**

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir,2003), *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on September 20, 2002 during the course and scope of Claimant's employment. I find that harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties' stipulation. Claimant injured his back and knee when he fell off a catwalk into the hold of a barge. The extent, duration and disabling effects of that injury, however, are in issue.

## **Nature and Extent**

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding &*

*Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5<sup>th</sup> Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

In the present case, the parties have stipulated that Claimant reached maximum medical improvement (MMI) on March 30, 2004, the date assigned by Dr. Johnston, Claimant's treating physician. I accept the parties' stipulation and agree that March 30, 2004 is the date Claimant reached MMI; therefore, any compensation awarded before that date will be temporary in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1<sup>st</sup> Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5<sup>th</sup> Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5<sup>th</sup> Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

In order to establish suitable alternative employment, the employer must identify jobs that are actually available within the local community that take into consideration the claimant's age, education, work experience, and physical restrictions. *Turner*, 661 F.2d 1031, 14 BRBS 1566. For job opportunities to be realistic, the employer must establish their precise nature, terms and availability. *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988). An employer can meet its burden by offering the claimant a job in its facility, *Spencer v. Baker Agricultural Co.*, including a light duty job, so long as it does not constitute sheltered employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

In this case, Claimant was removed from all work by Dr. Steiner on September 30, 2002, and was not released to sedentary duty until October 11, 2002. Thus, I find that Claimant has established a prima facie case for total disability from September 30 until October 11, 2002. Therefore, the burden shifts to Employer to establish the existence of suitable alternative employment.

In this instance, I find that the modified sedentary work offered by Employer did not constitute suitable alternative employment because Employer failed to establish the precise nature and terms of the employment it offered, and because the position offered by Employer was not realistic due to its location. As an initial matter, the only evidence of any work offered by Employer is a letter, dated November 15, 2002, addressed "to whom it may concern," stating that Employer agreed to provide Claimant with restricted work whenever "he is available." (EX 9). There is no mention of the type of work that would be provided, including whether the position would adhere to Claimant's physical restrictions in effect at the time. There is a letter to Carrier from Employer stating that Claimant was told on November 13 that restricted employment was available, but again there is no evidence of what the job would entail.

Consequently, the only information regarding the light duty position Employer presented to Claimant prior to the hearing was that something was available. At the hearing, Claimant acknowledged that he discussed work with Employer. Employer's counsel stated "they told you that it would be an office job, you're not sure of the duties, but you know it would be inside the office," to which Claimant responded, "Yeah, sitting, probably filing something." (Tr. 70). This information, however, is different from how Employer's representative Troy Gulotta described the work Claimant would have done. Mr. Gulotta testified that Claimant was told of available sedentary work in October, 2002, which would have involved Claimant working with inventory equipment, including "hauling clamps, putting clamps in boxes, fixing ladder brackets, putting oil on ladder brackets." (Tr 180).

Mr. Gulotta stated that when Claimant was released to moderate duty on November 22, 2002 there were also positions available that met those requirements. However, there is no evidence of what any of the sedentary or moderate duty positions entailed, nor is there evidence that any work was offered after November 15, 2002. In other words, by failing to identify the specific job which Claimant would be performing, the alleged light duty positions offered by Employer lacked the specificity required to qualify as suitable alternative

employment as of October 11, 2002, when Dr. Steiner released Claimant to sedentary duty, or as of November 21, 2002, when Dr. Johnston released Claimant to moderate duty.

Further, even assuming Employer did offer employment to Claimant that he could perform, considering his physical restrictions, the employment was not realistic due to its location. The Claimant's "local community" has been defined as the community in which the injury occurred and may include the area where the Claimant resided at the time of the injury. *Jameson v. Marine Terminals*, 10 BRBS 194 (1979). Employer offered Claimant work in LaPlace, Louisiana, which is neither where the accident occurred nor Claimant's place of residence at the time of the injury. In fact, LaPlace is approximately 50 miles from Claimant's home in Amite. Claimant has continually suffered from a lack of reliable transportation and has depended upon rides from co-workers or the use of others' automobiles to travel. It appears unrealistic to expect, and unreasonable to demand, that Claimant find transportation to LaPlace and to return to Amite, nearly 100 miles of commuting per day, five days per week. Employer was apparently aware of Claimant's lack of transportation, for in its letter dated November 15 regarding light-duty employment, it stated that transportation would be provided for Claimant to go to medical appointments scheduled during the workday (EX 9). Therefore, I find that Claimant was totally disabled from September 20, 2002 until February 13, 2003, the date suitable alternative employment became available to him through his own efforts.

On February 13, 2003, Claimant, through the union, returned to his previous occupation of assembling scaffolding in Pascagoula, Mississippi, earning \$16.56 per hour, plus overtime. He worked that job until he was fired for violation of Employer's substance abuse policy. Consequently, while Claimant maintains the job was too hard for him and he was terminated because he could not perform the tasks required of him, I do not find the evidence to support his assertions. Not only was Claimant terminated for reasons other than those he offered, but he subsequently found similar employment with another scaffolding company and went a year without returning to his physician. Consequently, I find as of February 13, 2003, Employer has met its *Turner* burden.

When suitable alternative employment is shown, the wages which the new position paid at the time of Claimant's injury are compared to Claimant's pre-injury wage to determine if he has sustained a loss of wage earning capacity. *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330 (1990). Because Claimant earned

the greater wage of \$16.67 per hour at the Pascagoula job, he has not demonstrated that after February 13, 2003, he suffered any loss of wage earning capacity.

### **Medicals**

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5<sup>th</sup> Cir. 1981), *aff'd* 12 BRBS 65 (1980).

In this case, Claimant requests the epidural steroid injections (“ESIs”) recommended by Dr. Johnston on his December 15, 2003 appointment. Dr. Johnston noted that the ESIs had not been approved as of March 30, 2004. Carrier’s claims representative, Kathy Hadlow, testified that she wanted Claimant to see Employer/Carrier’s choice of physician, Dr. Steiner, for a second opinion on whether the ESIs were medically necessary. (Tr. 207-209). Claimant did not attend an appointment with Employer’s physician, and has not received the ESIs. However, because Dr. Johnston was Claimant’s treating physician and recommended the ESIs only after attempting other forms of conservative treatment, I find that Claimant is entitled to the ESIs and Employer is responsible for their cost.

Claimant also asserts that Employer is responsible to provide the functional capacity exam that was never performed. However, as stated at the hearing by Kathy Hadlow, claims representative, Employer is the party that requested the FCE and subsequently cancelled it. Dr. Johnston’s record dated March 30, 2004 establishes that he ordered a cervical MRI to be performed, and stated “I will see [Claimant] back after the MRI has been done...at that point, I will consider a functional capacity evaluation if the MRI is normal.” (EX 14, p.12, CX 1, p.7). Claimant testified that he did not return to Dr. Johnston for a follow-up visit. Therefore, it is speculative whether Dr. Johnston would have ordered an FCE since his records only stated that it would be considered. Consequently, because Dr.

Johnston has not yet ordered the FCE to be conducted, Employer is not responsible for the costs associated with an FCE. However, should Claimant return to Dr. Johnston, and if in his professional opinion that an FCE is necessary treatment, Employer will be responsible for such costs.

### **Average Weekly Wage**

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.*, 13 BRBS 862 (1981), *rev'g* 698 F.2d 743, 15 BRBS 94 (CRT) (5<sup>th</sup> Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34 (CRT) (5<sup>th</sup> Cir.) *cert. denied*, 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit*, 24 BRBS 133 (1990).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5<sup>th</sup> Cir. 1991). Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. See *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991).

Section 10(c) is a general, catch-all provision applicable to cases where the methods in (a) and (b) cannot be realistically applied. Section (c) is used where the claimant's employment is seasonal, part-time, intermittent or discontinuous, or

where 10(a) or 10(b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822, 25 BRBS 26 (CRT) (5<sup>th</sup> Cir. 1991). Section 10(c) is also applicable where there is insufficient evidence if the record to make a determination of average daily wage under either 10(a) or 10(b). *Aproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991); *Lobus v. ITO Corp. of Baltimore*, 24 BRBS 137, 140 (1990).

The objective of 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of injury. *Empire United Stevedores*, 936 F.2d 819, 823, 25 BRBS at 26 (5<sup>th</sup> Cir. 1991). The administrative law judge has broad discretion in determining annual earning capacity under 10(c). *Sproull*, 25 BRBS at 105 (1991); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). Actual earnings are not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288 (1979), *aff'g in relevant part* 5 BRBS 290 (1977). Thus, the amount actually earned by the claimant at the time of injury is a factor but is not the overriding concern in calculating wages under 10(c). *Empire United Stevedores*, 936 F.2d at 823.

The parties agree that 10(c) is the appropriate method of calculation because Claimant's employment was intermittent and he had only worked for Employer for eight days prior to the accident; however, the parties differ on what the resultant average weekly wage should be. Claimant argues that his total wages, \$1508.32, divided by eight days results in a daily rate of \$188.54 which when multiplied by seven days per week equals an AWW of \$1319.78 and a corresponding compensation rate of \$879.85. Employer, on the other hand, asserts that Claimant's AWW should be established by assuming that his earnings with Employer were accurate, but further assuming, due to his spotty work history, that he only worked for six months during the year preceding the accident, resulting in an AWW of \$278.83.<sup>3</sup>

In this case, the determination of Claimant's average weekly wage is difficult due to the almost total lack of evidence regarding his earnings prior to working for Employer. In fact, the only evidence of Claimant's earnings pertains to the eight days he worked for Employer prior to the accident. These records indicate that Claimant worked a total of 66 regular hours, at \$10.75 per hour, 14.5 overtime hours at \$16.125 per hour, 16 travel hours at \$10.75 per hour, and eight

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3 Employer contends that Claimant's actual earnings in the period he worked were \$1115.32 over two weeks, resulting in an AWW of \$557.66. When \$557.66 is multiplied by 26 weeks (i.e. 6 months) then divided by 52 weeks, the corresponding AWW is \$278.83.

per diem payments of \$50 per day. Therefore, the total amounts paid to Claimant were \$881.50 (66 regular hours and 16 travel hours) plus \$233.82 in overtime, or a total of \$1115.32, plus \$400 in per diem payments. (EX 7, CX 13).

It is a well established rule that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable. *See Interstate Circuit, Inc. v. U.S.*, 455 F.2d 7 (5<sup>th</sup> Cir. 1972), *Cioffi v. Bethlehem Steel Co.*, 15 BRBS 201 (1982); 29 C.F.R. § 18.6(d)(2). In this case, despite repeated formal and informal attempts by Employer to obtain Claimant's wage documentation, through discovery and otherwise, Claimant failed to provide such documentation, nor did he testify at the hearing regarding his previous earnings. Carrier's representative testified that since becoming aware of Claimant's injury, she had attempted to obtain wage records to no avail (Tr. 91). Employer's counsel propounded discovery requesting the production of wage documentation, but such attempts were fruitless (EX 13). In sum, Claimant had adequate time, opportunity and notice to respond to Employer's request for such documents and has not offered an explanation for his failure to comply. Consequently, I infer that either Claimant did not work previously or that he had extremely low earnings when he did work.

Without documentation of Claimant's wage earning history in the record, I find it inappropriate for Claimant's average weekly wage to be based solely on the eight days he worked for Employer. There is no history establishing that Claimant had previously earned the \$10.75 hourly rate he was paid by Employer. In fact, the only testimonial evidence regarding his previous employment was that Claimant testified that his work history was sporadic and that he moved around from job to job and had periods of unemployment between jobs (Tr. 96). Though Claimant testified that he was told for "that job, period of time," his hours would be 12 hours per day, seven days per week, it is speculative, at best, to assume that Claimant would have worked such hours on a regular basis. In fact, his time cards show that some days he worked 10 hours, some he worked eight, and on occasion he only worked three hours (CX 13).

In other words, to utilize Claimant's suggested average weekly wage calculation of \$1319.78 would result in an annual income of over \$68,000. This figure is too speculative and is based on such scant evidence of record that I cannot find that such a result would serve the purpose of determining a fair and reasonable approximation of Claimant's annual wage-earning capacity at the time of injury. Without more evidence, allowing Claimant to rely solely on eight days

of employment as indicative of his wage-earning capacity would result in overcompensation to Claimant, a result clearly not intended by 10(c).<sup>4</sup>

Similarly, to use Employer's proffered method of calculation and assume that Claimant only worked for six months out of the year preceding the injury is equally presumptive and also would not result in a fair and reasonable approximation of Claimant's wage-earning capacity. There is no testimony that Claimant worked six months, or more, or less. The evidence in this case provides no information regarding how much Claimant worked in the preceding year, thus, there is no basis in the record for selecting a period of six months' duration upon which to base Claimant's wage-earning capacity.

Consequently, because discovery efforts were unanswered, and Claimant refused to shed light on the issue, I find that Claimant's entitlement is the minimum compensation rate during the period of his disability.

#### **Section 14 (e) Penalties**

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation on November 18, 2002, nearly two months after the injury occurred. Therefore, as Employer did not pay compensation within 14 days of learning of injury, Claimant is owed § 14 (e) penalties, the exact amount to be calculated by the District Director.

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<sup>4</sup> Claimant argues that the Fifth Circuit "has approved the use of [10(c)] by an ALJ to determine Claimant's average weekly wage from only the actual wages earned from the employment at the time of the injury." However, in the case cited by Claimant, the Fifth Circuit, in reviewing the AWW calculation, noted that in determining the claimant's AWW, the ALJ added claimant's gross pay, vacation pay, and container royalty benefits from the year prior to the claimant's injury. *James J. Flanagan Stevedores, Inc. v. Director, OWCP* 219 F.3d 426, 433, 34 BRBS 35 (CRT) (5<sup>th</sup> Cir. 2000). Thus, the record in that case was a more typical one in that it contained evidence of claimant's earnings for the year preceding the injury, whereas in the instant case, the problem is that there is no such evidence of record.

## **ORDER**

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from September 30, 2002 until February 13, 2003, the date Claimant secured suitable alternative employment, based on the minimum compensation rate in effect at that time;

(2) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's injuries of September 20, 2002.

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Pursuant to Section 14(e) of the Act, Employer shall be assessed penalties on all compensation not timely paid, the exact amount to be calculated by the District Director as heretofore set out;

(5) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 30<sup>th</sup> day of November, 2004, at Metairie, Louisiana.

**A**

**C. RICHARD AVERY**  
**Administrative Law Judge**

